**IN THE HIGH COURT OF DELHI AT NEW DELHI**

**+ IA No.9250/2000 & 11013/2000 in CS (OS) 1709/2000**

% Judgment delivered on :10.07.2007

**M/S NORTHERN COALFIELDS LTD** .... Plaintiff

versus

**M/S HEAVY ENGINEERING CORPN. LTD & ANR.** .... Defendants

**Advocates who appeared in this case:-**

For the Plaintiffs : Mr Anip Sachthey with Mr Mohit Paul
For the Defendant No.1 : Ms Maneesha Dhir with Ms Preeti Dalal
For the Defendant No.1 : Mr Anurag Jain

**CORAM:-**
**HON'BLE MR JUSTICE BADAR DURREZ AHMED**

1. Whether the Reporters of local papers may be allowed to see the judgment ? YES
2. To be referred to the Reporter or not ? YES
3. Whether the judgment should be reported in the Digest ? YES

**BADAR DURREZ AHMED, J**

1. This order shall dispose of two applications: (i) IA 9250/2000 filed by the defendant No.1 (Heavy Engineering Corporation Ltd) (HEC) under Order VII Rule 11 of the Code of Civil Procedure, 1908 (hereinafter referred to as the CPC) for rejection of the plaint; (ii) IA 11013/2000 filed by the defendant No.2 (M/s Rampur Engineering Company Limited) (REC) for the similar relief of rejection of the plaint under Order VII Rule 11 CPC.

2. Both the defendants contend that the suit is essentially a challenge to arbitral awards and the same is not permissible under law. It is also contended on behalf of the applicants that the plaintiff (Northern Coalfields Ltd.) (NCL) is a Public Sector Undertaking. The awards were passed pursuant to their submitting themselves to arbitration under the permanent machinery of arbitration set up by the government. There is a prescribed procedure for challenging the award which does not include the filing of a suit. It was also contended on behalf of the applicants that since the disputes are primarily between two Public Sector Undertakings, namely, NCL and HEC, permission of the Committee on Disputes was necessary before the suit could have been filed. This was submitted in the context of the Supreme Court decisions in ***Oil and Natural Gas Commission and Anr v. Collector of Central Excise: 1995 Supp (4) SCC 541*** and other similar decisions of the Supreme Court. On the other hand, it was contended on behalf of the plaintiff (NCL) that the arbitration proceeding before the permanent machinery of arbitration was itself *non est* and, therefore, this suit could have been filed. This was contended on the basis of the submission that the arbitration proceedings under the permanent machinery of arbitration which concerned disputes between Public Sector Undertakings was not correctly invoked because the dispute though, ostensibly, between NCL and HEC was actually with respect to a private party REC. HEC was merely a proxy for REC. Disputes between a Public Sector Undertaking and a private party could not be settled under the permanent machinery of

arbitration. Hence the awards and the appellate awards involved in this case were *non est*. Accordingly, it was submitted that the suit was maintainable.

3. Before examining these submissions, it would be appropriate to briefly set out the facts. On 21.09.1988, a contract was entered into between NCL and HEC under which, for a sum of Rs 33 crores, HEC was required to construct and set up a Coal Handling Plant at Bina, Madhya Pradesh. Clause 3 of the said contract prohibited subletting of the contract without the written consent of NCL. This contract also contained an arbitration clause whereby the disputes between NCL and HEC were to be referred for settlement through arbitration and the arbitration was to be conducted under the provisions of the Arbitration Act, 1940.

4. Within 45 days of the said contract dated 21.09.1988 between NCL and HEC, HEC allegedly sub-contracted the entire work to REC (defendant No.2 herein) for a sum of Rs 28 crores. In May, 1993, HEC raised claims before the arbitrator for Rs 21,22,48,948/- in respect of works and services and Rs 8.24 crores in respect of supply and equipments. Both the claims were before Mr Shiv Prakash, Joint Secretary and Legal Adviser to the Government of India, Ministry of Law and Justice, Department of Legal Affairs, New Delhi, as he was posted as the sole arbitrator in the permanent machinery of arbitration, Department of Public Enterprises and was appointed as such by the Secretary,

Department of Public Enterprises by the communication dated 09.08.1994 to arbitrate upon the said commercial disputes arising between HEC and NCL. At this juncture, it would be relevant to note that although the contract dated 21.09.1988 required the reference to arbitration under the provisions of the Arbitration Act, 1940, that clause had been superseded by virtue of the establishment of the permanent machinery of arbitration, which was set up to take care of the commercial disputes between Public Sector Enterprises. It must also be mentioned that in the meanwhile, in 1991, the Supreme Court in the said ONGC case had also directed the setting up a Committee on Disputes for an in-house settlement of disputes between, *inter alia*, Public Sector Undertakings.

5. In respect of the claims filed by the HEC, NEC also filed counter-claims of Rs 61,44,32,950.11p in respect of coal transportation cost, reduction in size of the receiving pit and non-utilization of the deshaling plant. Thereafter, the proceedings before the said arbitration continued and culminated in making of two awards, both dated 28.02.1997. By virtue of the said Awards a total amount of Rs 16,87,61,981.11p was awarded to HEC after deducting an amount of Rs 56,05,000/- awarded to NCL in respect of its counter claims. As both HEC and NCL were not fully satisfied with the awards, both of them filed appeals as provided under the permanent machinery of arbitration. HEC filed its appeal No.67/1998 in respect of the award for supply and equipments and

NEC filed its appeal No.64/1998 in respect of the award for works and services. It would be pertinent to note that under the permanent machinery of arbitration, as applicable at that time, it was specifically provided that the Arbitration Act, 1940 shall not be applicable. It was also provided that the award of the arbitrator shall be binding upon the parties in dispute provided, however, any party aggrieved by such award, may make a further reference for setting aside or revision of the award to the Law Secretary, Department of Legal Affairs, Ministry of Law and Justice, Government of India. Upon such further reference, the dispute shall be decided by the Law Secretary or Special Secretary, Additional Secretary when so authorized by the Law Secretary and the decisions taken by such authority shall bind the parties finally and conclusively. This provision for further reference is also known as an appeal.

6. In February, 1999, REC filed a suit No. 450/1999 against both HEC and NCL, praying for an order of injunction restraining HEC from settling its disputes with NCL. According to the plaintiff (NCL), it is only when the said suit was filed and notice was received by it on 01.03.1999, that NCL came to know of the existence of the contract dated 04.11.1988 between HEC and REC by virtue of which the entire work had been sublet by HEC to REC in purported violation of Clause 3 of the contract dated 21.09.1988 between NCL and HEC. The appellate authority (Mr D. P. Sharma, Additional Secretary, Ministry of Law, Justice and Company Affairs, Department of Legal Affairs, Shastri

Bhawan, New Delhi) made an appellate award in appeal No. 67/1998 on 01.11.1999 remanding the matter with regard to supply and equipments to the arbitrator for reconsideration. By another appellate award dated 30.11.1999, the said appellate authority disposed of the appeal No.64/1998 by awarding a sum of Rs15,84,50,000/- in favour of HEC in respect of works and services. An additional amount of Rs 3.73 crores was also awarded to HEC by way of interest.

7. After the making of the said appellate awards, NCL filed the present suit seeking the following prayers:-

> "(a) declare that there is breach of Clause 3 of contract dated 21.09.1988 by the Defendant No.1, by entering into a contract dated 04.11.1988 with Defendant No.2, subletting the whole of the execution of project of Construction of Coal Handling Plant at Bina to Defendant No.2.
>
> (b) declare that in view of the complete prohibition contained in Clause 3 of the Contracts, both dated 21.09.1988 between the plaintiff and defendant No.1, the sub-letting of the both the contracts in entirety by defendant No.1 to defendant No.2 by contract dated 04.11.1988, which also stipulates approval of the plaintiff vitiates the basic structure of the contracts and consequently the action of sub-letting be declared illegal, null and void.
>
> (c) declare that the absence of approval of the plaintiff for engaging defendant No.2 M/s Rampur Engineering Company as sub-contractor for executing BINA CHP vitiates the contract dated 04.11.1988 and consequently any action taken under such a contract is illegal, null and void.

(d) declare that the defendant No.2 does not have any rights under the vitiated contract, dated 04.11.1988 to claim any participation, benefit and/ or advantage in any proceedings pending or the benefit of the Awards delivered by the learned Arbitrator / Appellate Authority in Appeal Nos. 64/1998 and 67/1998 as the case may be.

(e) declare that the award dated 01.11.99 and 30.11.1999 passed by the Appellate Authority in Appeal No.67/1999 and Appeal No.64/1999 are illegal, exfacie bad and suffering from errors apparent on the face of the record, patently erroneous and liable to be set aside by this Hon'ble Court.

(f) pass a decree of permanent injunction, in view of the sub-letting of the contract dated 21.09.1988 by defendant No.1 to defendant No.2 (vide contract dated 04.11.1988), contrary to the contractual provisions, restraining the defendant No.1 and the defendant No.2 from claiming any benefit or advantage under the awards dated 01.11.99 and 30.11.99 passed by the Appellate Authority particularly when the awards passed are ex-facie bad, illegal, suffering from errors apparent on the face of the record and liable to be set aside."

It is in the context of these facts that the two applications under Order VII Rule 11 need to be considered. It is apparent that NCL cannot seek any relief in the matter unless and until the appellate awards are set aside. This is exactly what NCL seeks to do by filing this suit. The question is whether the plaintiff is entitled to seek a declaration that the appellate awards are illegal and liable to be set aside by way of this suit. NCL and HEC are both Public Sector Undertakings. They submitted themselves to arbitration under the permanent machinery of arbitration as indicated above. Being dissatisfied with the initial awards, both NCL and HEC filed appeals under the prescribed procedure for

challenging awards. The appellate authority has made the appellate awards on 01.11.1999 and 30.11.1999. As already noted above, the procedure under the permanent machinery of arbitration clearly stipulates that the decision of the appellate authority shall bind the parties finally and conclusively. There is no further remedy provided under the permanent machinery of arbitration. It is also clear that neither the Arbitration Act, 1940 nor the Arbitration and Conciliation Act, 1996 is applicable in respect of the arbitration under the said permanent machinery of arbitration. Therefore, the said appellate awards cannot be challenged under the procedure provided in those acts. Moreover, once parties subject themselves to arbitration, there is no question of a suit being entertained in respect of the same dispute. In any event, the filing of a suit is not the remedy for challenging an arbitral award.

8. It was contended by the learned counsel for NCL that as the arbitration proceedings were *non est* because of the involvement of a private party (REC), a suit could very well be filed. The question that arises is whether a suit could at all be filed once awards had been made in the arbitration proceedings. The answer is clearly no. This is so because an arbitral award cannot be set aside in a suit. And, unless and until the appellate awards dated 01.11.1999 and 30.11.1999 are set aside, NCL has no case.

9. NCL has also sought a declaration that HEC has breached Clause 3 of the contract dated 21.09.1988, which was entered into between them. The breach is alleged on the ground that HEC sublet the execution of the whole project to REC without the written consent of NCL. The dispute here once again is between NCL and HEC because there is no privity of contract between NCL and REC. Whatever relationship REC has with NCL, is only through HEC.

10. In the light of these considerations, it must also be remembered that the dispute is essentially one between two Public Sector Undertakings, NCL and HEC. The learned counsel for the defendants have rightly contended that, in any event, this suit could not have been filed without the clearance of the Committee on Disputes. Admittedly, no such clearance has been taken and, therefore, the plaint is liable to be rejected. It must be noted that the requirement of taking the clearance from the Committee on Disputes has been necessitated because of various Supreme Court pronouncements including:-

(i) ***Oil and Natural Gas Commission v. CCE: 1992 Supp (2) SCC 437***

(ii) ***Oil and Natural Gas Commission v. CCE: 1995 Supp (4) SCC 541***

(iii) ***Chief Conservator of Forests Govt. of A.P. v. The Collector and Ors.: 2003(3) SCC 472***

(iv) ***Mahanagar Telephone Nigam Ltd. v. Chairman, Central Board, Direct Taxes: (2004) 6 SCC 431***

(v) ***Oil and Natural Gas Commission v. Collector of Central Excise:(2004) 6 SCC 437***

In the last of the above mentioned cases which is a decision of three Hon'ble Judges of the Supreme Court, the entire case law has been reviewed and it has been noted in paragraph 2, with reference to the earlier ONGC decision in ***1995 Supp (4) SCC 541*** that the Cabinet Secretariat has issued instructions from time to time to all departments of the Government of India as well as to public sector undertakings of the Central Government to the effect that all disputes, "*regardless of the type*", should be resolved amicably by mutual consultation or through the good offices of empowered agencies of the Government *or through arbitration* and "*recourse to litigation should be eliminated*". The Court observed:-

> " It is abundantly clear that the machinery contemplated is only to ensure that no litigation comes to court without the parties having had an opportunity of conciliation before an in-house committee"

The Supreme Court also held that it shall be the obligation of every court and every tribunal where such a dispute is raised hereafter to demand a clearance from the Committee on Disputes, in case it has not been so pleaded, and in the absence of the clearance, the proceedings would not be proceeded with. These declarations of the Supreme Court fall within the ambit of Article 141 of the Constitution of India which provides that the law declared by the Supreme Court shall be binding on all courts within the territory of India. The requirement of getting a clearance from the Committee on Disputes, being law

declared by the Supreme Court, is binding on this Court. Since no such clearance has been taken by NCL, this suit cannot be proceeded with.

11. The learned counsel for the plaintiff (NCL) had referred to the decision of the Supreme Court in the case of ***Canara Bank and Others v. National Thermal Power Corporation and Another: (2001) 1 SCC 43.*** In that case, which was a decision of two Hon'ble Judges of the Supreme Court, it was observed as under:-

> "12. What the Court has directed in ONGC's case[1] is that frivolous litigation between Government Departments and Public Sector Undertakings of the Union of India should not be dragged in the courts and be amicably resolved by the Committee. The judgment is intended to prevent avoidable litigation between the Government Departments and the Undertakings of the Union of India. In the present litigation there does not appear to be a genuine dispute between the Government of India undertakings. In this case one of the public sector undertaking is shown to be acting not as an undertaking but as Trustee of a Trust. The Board was, therefore, justified in holding "that the real litigation in this case, therefore, is between Mutual Fund and NTPC" and not between the two undertakings. The meaning of word "dispute" is, "a controversy having both positive and negative aspects. It postulates the assertion of a claim by one party and its denial by the other". In the instant case the claim preferred on behalf of the CBMF was not denied by the Corporation but in turn a counter claim with respect to the liability of a subsidiary of the Bank was raised. The dispute raised is without laying any basis or placing on record any evidence in support thereof. Imaginative disputes raised only to defeat the undisputed claim of the Trustee could not be made basis to deprive the Trustees and ultimately the public at large, of the value of the bonds which had, admittedly, been received by the

1 1995 Supp (4) SCC 541

> Corporation with unambiguous undertaking to repay back the same."

In the context of the above observations, the learned counsel submitted that the real dispute in this case is between NCL and REC and, therefore, in view of this decision, it would not be necessary to obtain any clearance from the Committee on Disputes. I am unable to agree with this submission of the learned counsel appearing on behalf of the NCL. The reason is that in ***Canara Bank****(supra)*, the Court was of the view that the dispute raised by the respondent with the appellant was imaginary and even prima facie not real whereas in the present case the essence of the dispute is between NCL and HEC inasmuch as it is contended that HEC violated Clause 3 of the contract dated 21.09.1988 by subletting the whole work to REC. The key players are NCL and HEC, which are both Public Sector Undertakings. The dispute between them is genuine and real. Therefore, the ratio of the decision in ***Canara Bank****(supra)* would not be applicable to the facts of the present case.

12. For all the reasons indicated above, the applications are allowed. The plaint is rejected. All interim orders stand vacated.

**BADAR DURREZ AHMED**
**(JUDGE)**

**July 10, 2007**
*SR*